BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRANDON L. SNIDER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,026,183
SPEARS MANUFACTURING COMPANY	)	
Respondent	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the October 15, 2007 Award of Administrative Law Judge Thomas Klein. Claimant was awarded benefits for an 18 percent permanent partial functional disability to the right lower extremity for the injury suffered to claimant's right knee. The Administrative Law Judge (ALJ) determined that claimant's accident arose out of and in the course of his employment with respondent.

Claimant appeared by his attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas C. Hobbs of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on January 18, 2008.

ISSUES

1. Did claimant's accidental injuries arise out of and in the course of his employment with respondent? Respondent alleges claimant's right knee injury was the result of a personal condition and did not come from claimant's work activities. Additionally, claimant did not initially describe any type of a slip or fall. By the time claimant had reached the preliminary hearing on January 12, 2006, his description of the

accident had migrated to include a slip and fall either on a wet floor or because of wet boots. This slip and fall history was not provided to any supervisor or medical treater for several months after the alleged accident. Respondent contends claimant's credibility should be seriously questioned. Claimant alleges he slipped and fell because he was leaving the bathroom after mopping, with wet boots on a slick floor. Therefore, the award of benefits should be affirmed.

2. What is the nature and extent of claimant's injuries? Respondent argues that if claimant is entitled to an award, Chris D. Fevurly, M.D.'s 13 percent impairment to the right lower extremity should be awarded. Claimant argues that the 23 percent impairment to the right lower extremity by Pedro A. Murati, M.D., is the most accurate. The ALJ averaged the two and awarded claimant an 18 percent permanent partial loss of use of the leg on a functional basis.

FINDINGS OF FACT

Claimant was employed by respondent as a welder and pipe fitter. His duties included maintenance work, welding and pipe fitting. Claimant had been employed by respondent for about one year when, on August 17, 2005, he fell as he was walking toward the break room after mopping the bathroom. As he was walking, claimant dislocated his right knee and he fell to the ground. It is not disputed that claimant suffered an injury on the date alleged. The dispute centers around whether claimant suffered a work-related injury or whether the fall was the result of a personal condition.

Shortly after the fall, which occurred toward the end of the workday, claimant spoke to Sam Camacho, his lead person, about the fall. Claimant told Mr. Camacho that he fell when he came out of the bathroom. Mr. Camacho testified that claimant stated that his leg "blew out" and that it had happened before. However, Mr. Camacho was not aware of any prior right knee problems claimant may have experienced at work. Claimant did not tell Mr. Camacho that he had slipped on the floor. There is a dispute as to whether the floor where claimant fell was wet. Mr. Camacho did not check the floor after the fall and was unable to describe its condition at the time of the fall.

Also, on that day, Mark Manderscheidt, the main shop foreman, was advised of claimant's injury. Claimant said that his knee had given out on him and he had fallen. Claimant advised Mr. Manderscheidt that he had problems with his knees before and it was something that he dealt with on a fairly regular basis. Claimant did not tell Mr. Manderscheidt that he had slipped on the floor or that his shoes were wet, just that his knee had given out while he was walking.

Claimant did not seek medical treatment that day. The next day he went to work with a sports brace on his leg. After being at work for about 45 minutes, claimant told Mr. Camacho that he needed to go to a doctor because he was in a great deal of pain. After talking to both Mr. Camacho and Mr. Manderscheidt, claimant went to the doctor, first seeing his primary care doctor, William H. Davito, D.O. Dr. Davito prescribed a knee brace, took claimant off work and advised claimant to see an orthopedic specialist. Claimant contacted respondent and asked if he could return to work, but was advised he needed to be "a hundred percent"[1] before he could return to work. Respondent also referred claimant to family practitioner and company doctor, Gregory H. Mears, D.O. Dr. Mears also recommended claimant have an orthopedic consult. Claimant advised Dr. Mears that he was walking and "dislocated" the knee.[2] Claimant described prior left knee problems to Dr. Mears, but not right knee problems. Claimant told Dr. Mears that he had dislocated his knee by walking, which the doctor thought was rather odd, because "you don't normally dislocate your knee by walking."[3] Dr. Mears' records contain no notation of a slip by claimant on the date of accident. Claimant notified respondent of Dr. Mears' recommendation, but claimant was not sent to an orthopedic specialist.

Claimant then went to Tracy Painter, M.D., on his own referral. Dr. Painter sent claimant to physical therapy, which did not solve claimant's problems. Claimant then underwent two surgeries by Dr. Painter. The first, on September 7, 2005, involved a right knee arthroscopic lateral release and medial imbrication with open medialization of the tibial tubercle. After this first surgery, claimant developed sepsis and as a result, underwent a second surgery on October 26, 2005. In between the surgeries, claimant worked two weeks of light duty with respondent. After the second surgery, claimant was off work for two weeks and then returned to light duty. On December 13, 2005, Dr. Painter released claimant to full duty, with no restrictions. In February 2006, claimant terminated his employment with respondent and moved to Texas where he went to work for a company called ICS, Inc., as a pipe fitter. At the time of the regular hearing, claimant was working in Texas for Infinity Maintenance as a pipe fitter.

On August 26, 2005, claimant gave a recorded claims statement to workers compensation insurance adjuster Melanie Eagan. During this telephonic interview, claimant described coming out of the bathroom and, as he was walking to the break room,

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[1] P.H. Trans. at 14.

[2] Mears Depo. at 10.

[3] Mears Depo. at 13.

his right knee "popped out of socket". Claimant then fell to the ground.[4] Claimant did not claim during the interview that he slipped on the date of accident.

Claimant was referred by respondent to board certified internal medicine and occupational medicine specialist Chris D. Fevurly, M.D., for an examination on March 30, 2007. Claimant advised Dr. Fevurly that he slipped on a wet substance on the floor and struck his right knee. Claimant told Dr. Fevurly that he had never had patellar instability in the right knee. But Dr. Fevurly, after reviewing Dr. Painter's August 23, 2005 dictation, testified that claimant had prior right knee dislocations. Dr. Fevurly diagnosed claimant with right knee patellar instability and dislocation of the kneecap on August 17, 2005. He opined the patellar instability was a preexisting condition. Dr. Fevurly rated claimant pursuant to the fourth edition of the AMA *Guides*[5] at 13 percent to the right lower extremity. Dr. Fevurly talked about the two ways to rate the knee under the *Guides*. Using the muscle atrophy in claimant's right thigh, claimant would have the 13 percent lower extremity impairment. Using the Diagnosis-Related Estimates (DRE), claimant would have a 10 percent lower extremity impairment. It is appropriate to give the higher of the two ratings, but not appropriate to combine the ratings because they are duplicative.[6] Dr. Fevurly testified that claimant was predisposed to dislocate his patella. The dislocation occurs when an individual changes direction. There is no indication in this record that claimant suffered the right knee injury as a result of a direction change while he was walking.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an examination on August 21, 2006. The history provided Dr. Murati indicated claimant slipped on a smooth floor and twisted his right knee. Dr. Murati diagnosed claimant with a post-surgery right knee and the most prominent Oschgood-Schlatter's deformity of the right knee he had ever seen in his life. This is a developmental condition which had nothing to do with claimant's injury. But, Dr. Murati later agreed that Oschgood-Schlatter's could contribute to a kneecap dislocating. Dr. Murati rated claimant, pursuant to the fourth edition of the AMA *Guides*,[7] for the right thigh atrophy at 13 percent to the lower extremity, for the right patellofemoral syndrome at 5 percent lower extremity rating and for the cruciate ligament laxity at 7 percent to the lower extremity, all of which combine for a 23 percent right lower extremity functional impairment.

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[4] R.H. Trans., Res. Ex. 1 at 3.

[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[6] Fevurly Depo. at 16 & 20-21; AMA *Guides* (4th ed.), page 3/84.

[7] AMA *Guides* (4th ed.).

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[8]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[9]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[10]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[11]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[12]

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[8] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[9] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[10] K.S.A. 2005 Supp. 44-501(a).

[11] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[12] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.[13]

> An injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.[14]

> An injury shall not be deemed to have been directly caused by the employment where the injury results from normal activities of day-to-day living.[15]

In workers compensation litigation, a claimant bears the burden of proving his or her entitlement to the benefits requested. Here, claimant has provided several versions of the alleged injury. Initially, claimant just suffered a dislocation of his right knee as he walked from the bathroom to the break room. This story was consistent with Mr. Camacho, Mr. Manderscheidt and Dr. Mears. Not until the preliminary hearing, five months after the alleged date of accident, did claimant begin describing a slip on the floor. Additionally, claimant discussed, both with Mr. Camacho and Mr. Manderscheidt, the fact his knee problems were preexisting. This history of prior problems is contained in the records of Dr. Painter, and is supported by the findings of Dr. Murati, claimant's expert, who found claimant to be suffering from Oschgood-Schlatter's deformity of the right knee which he described as the most prominent Dr. Murati had ever seen and which could contribute to the kneecap dislocation.

Injury or personal injury has been defined to mean,

> . . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.[16]

Claimant suffered from a preexisting knee condition. However, if claimant had suffered some unusual stress such as a slip or twist or fall, the accident could be

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[13] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[14] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 1, 147 P. 3d 1091, *rev. denied* 281 Kan. ___ (2006).

[15] *Id.* at Syl. ¶ 2.

[16] K.S.A. 2005 Supp. 44-508(e).

compensable. Here, claimant's description of the incident is so contradictory and convoluted, it is impossible to say what exactly occurred on the date of accident.

The Kansas Supreme Court has analyzed workplace hazards using "three general categories of risks: (1) those distinctly associated with the job; (2) risks which are personal to the worker; and (3) the so-called neutral risks which have no particular employment or personal character."[17] Risks falling in the first category are universally compensable. Personal risks do not arise out of the employment and are not compensable. The so-called neutral risks are generally compensable. The simple explanation is that if an employee falls while walking down the sidewalk or across a level factory floor for no discernable reason, the injury would not have happened if the employee had not been engaged upon an employment errand at the time.[18] In this instance, the simple explanation is contradicted by claimant's varied histories of accident and by Dr. Murati's diagnosis of Oschgood-Schlatter's deformity, which may or may not have contributed to claimant's right knee dislocation. The Board finds that claimant has failed in proving the injury suffered on August 17, 2005, while walking from the bathroom to the break room, arose out of and in the course of claimant's employment with respondent. Therefore, the Award of the ALJ granting claimant benefits should be reversed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be reversed, as claimant has failed to prove that his injuries suffered on August 17, 2005, arose out of and in the course of his employment with respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas Klein dated October 15, 2007, should be, and is hereby, reversed.

IT IS SO ORDERED.

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[17] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

[18] 1 *Larson's Workers' Compensation Law* § 7.04[1][a] (2006).

Dated this ____ day of February, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge